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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: JAN 12 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish that it had the continuing ability to pay the proffered wage and denied the petition, accordingly.

The AAO issued a Notice of Intent to Deny and Notice of Derogatory Information (NOID/NDI) on October 19, 2011 relevant to the petitioner's ability to pay the proffered wage within the context of filings for multiple other immigrant and nonimmigrant petitions.[1] The AAO additionally noted other derogatory and inconsistent information pertinent to this proceeding:

> The Form ETA 750 and the Form I-140 petition both state the petitioner's address as [redacted] Chicago, Illinois, [redacted] During the adjudication of the appeal, evidence has come to light that the petitioning business in this matter: [redacted] as stated on the Form ETA 750 and on the Form I-140 as the employer, has no history that it has ever been registered to do business in Illinois. Further, [redacted] was dissolved in the state of Tennessee on [redacted] 2010 and dissolved in the state of Maine on [redacted] 2005. Finally, DOL has designated [redacted] as a debarred entity. *See* attached print-outs from the state online websites and from the DOL official website which indicates that [redacted] has been debarred from [redacted] 2010 to [redacted] 2012.[2] The Florida entity, currently debarred, appears to be the

[1] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] [redacted] was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f). We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on

entity that had employed the beneficiary in 2006 and 2007, according to the 2006 and 2007 Wage and Tax Statements (W-2s) submitted to the record,[3] although it possessed a different federal employer identification number (FEIN)[4] than the entity listed on the Form I-140. However, it may be concluded that for debarment purposes, the entity known as [redacted] should be

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October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.

[3]In 2005 and 2006, the beneficiary's W-2s indicate that the beneficiary resided in Columbus, Ohio, although the employer was listed with the Tampa, Florida address.

[4] The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment, and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification cannot be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

> treated as a debarred entity.[5] Therefore, USCIS may not approve a nonimmigrant or immigrant petition during the debarment period, regardless of when it was filed. Accordingly, the instant petition must be denied as the petition became ready for adjudication during the period of debarment.

The petitioner was afforded thirty (30) days to respond to the issues raised in the NOID/NDI and additionally provide evidence that the petitioning business is not a debarred entity and is a *bona fide* petitioner. In the NOID/NDI, the AAO specifically alerted the petitioner that failure to respond to the NOID/NDI would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner failed to respond to the NOID/NDI, the AAO is dismissing the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[5]The record contains a copy of a September 18, 2008, letter from the petitioner's president stating that [redacted] in Florida and in Tennessee merged. No date of merger is indicated. The letterhead on the letter is the same address in Florida as the address contained in the DOL debarment list. The bottom of the letter gives [redacted] locations in [redacted] and [redacted] In any further filings, the petitioner would need to submit evidence related to the merger as it would impact the petitioner's ability to pay the beneficiary's proffered wage.